Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

KENT ANDREW FOLLETTE, JANE ELIZABETH FOLLETTE, INDIVIDUALLY AND AS NEXT FRIENDS OF ANDREW STEPHENSON FOLLETTE, A MINOR CHILD,

Petitioners,

v.

CLAIROL, INC. AND WAL-MART STORES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners, the Follettes, respectfully request that the Court grant their petition and hear their case.

I.

In an effort to harmonize the conflict between the various circuits, Respondents argue that the underlying statutes distinguish this case from the conflicting decisions in *Knowlton*[1] and *Bane*[2]. To accomplish this result, Clairol and Wal-Mart misrepresent the meaning of Tex. Bus. Corp. Act Ann. art. 8.02. From that statute, Respondents characterize the phrase – "as to all matters affecting the transaction of intrastate business in this state" – as a limiting factor on Texas' *in personam* jurisdiction over foreign corporations. There is no such limitation and no Texas court, state or federal, has interpreted this statute in such a manner. Article 8.02[3] reads in its entirety as follows:

> Art. 8.02. Powers of Foreign Corporation
>
> A. A foreign corporation which shall have received a certificate of authority under this Act shall, until its certificate of authority shall have been revoked in accordance with the provisions of the Act or until a certificate of withdrawal shall have been issued by the Secretary of State as provided in this

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[1] *Knowlton v. Allied Van Lines*, 900 F.2d 1196 (8th Cir. 1990)

[2] *Bane v. Netlink Inc.*, 925 F.2d 637 (3rd Cir. 1991)

[3] This provision is rooted in the Model Business Corporation Act

> Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; *and, as to all matters affecting the transaction of intrastate business in this State, it and its officers and directors shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation* of like character and its officers and directors; provided, however, that only the laws of the jurisdiction of incorporation of a foreign corporation shall govern (1) the internal affairs of the foreign corporation, including but not limited to the rights, powers, and duties of its board of directors and shareholders and matters relating to its shares, and (2) the liability, if any, of shareholders of the foreign corporation for the debts, liabilities, and obligations of the foreign corporation for which they are not otherwise liable by statute or agreement. (emphasis ours)

Under nearly identical fact situations, two Texas decisions, *Goldman v. Pre-fab Transit Co.*, 520 S.W.2d 597 (Tex. Civ. App. – Houston [14th Dist.] 1975, no writ) and *Acacia v. Champlin Exploration, Inc.*, 769 S.W.2d 719 (Tex. Civ. App. – Houston [1st Dist.] 1989, no writ) used 8.02 as authority to confer jurisdiction and did not consider article 8.02 as, in any way, limiting personal jurisdiction to only intrastate matters. Neither the Fifth Circuit nor the Louisiana district court, in this case, found any such

jurisdictional restriction within the meaning of the statute.[4] The Fifth Circuit, in adopting the magistrate judge's Report and Recommendation, rendered its opinion purely on due process grounds. Consequently, there is no mention of article 8.02 impacting *in personam* jurisdiction in either opinion.

The phrase in question merely represents the statute's obedience to Congress' constitutional power over interstate commerce[5] and reflects Texas' desire to impose, within constitutional limits, the "same duties, restrictions, penalties and liabilities" on a foreign corporation as a domestic corporation of like character. That is all the statute says. The published comment of the Bar Committee – 1955 confirms such an interpretation. See Tex. Bus. Corp. Act Ann. art. 8.02, Comment of Bar Committee – 1955. See also *H. Rouw Co. v. Railway Exp. Agency*, 154 S.W.2d 143, 145 (Tex. App. El Paso 1941).

Likewise, in the context of Part Eight of the Texas Business Corporation Act, when taken as a whole, it is abundantly clear that *in personam* jurisdiction was never intended to be limited by article 8.02. There are numerous indications of this throughout the entire Act.

The most relevant statute, Texas Bus. Corp. Act Ann. art. 8.10, contains no words of limitation although it deals directly with the issue of service of process on a foreign corporation. See *Goldman* and *Acacia*, supra. Article 8.10B, however, does act to limit the personal jurisdiction of a

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[4] *Follette v. Clairol, Inc.*, 829 F. Supp. 840 (W.D.La.), *aff'd*, 998 F.2d 1014 (5th Cir. 1993) (table entry)

[5] U.S. Const. Art. 1 sec. 8 *cl.* 3.

withdrawing corporation. Thus, the Texas legislature certainly knew how to limit personal jurisdiction when it desired to do so. *cf. Knowlton,* supra.

Additionally, Tex. Bus. Corp. Act Ann. art. 8.01(B)(1) provides in pertinent part as follows:

> B. Without excluding other activities which may not constitute transacting business in this state, *a foreign corporation shall not be considered to be transacting business in this state,* for the purposes of this Act, by reason of carrying on in this state any one (1) or more of the following activities:
>
> (1) Maintaining or *defending* any action or suit or any administrative or arbitration proceedings, or effecting the settlement thereof or the settlement of claims or disputes to which it is a party. (emphasis ours)

This particular statute excepts litigation altogether from the definition of "transacting business" and together with Tex. Bus. Corp. Act Ann. art. 8.18 permits litigation involving foreign corporations and the *defending* of any lawsuits in Texas by both licensed and unlicensed foreign corporations:

> The failure of a foreign corporation to obtain a certificate of authority to transact business in the State shall not impair the validity of any contract or act of such corporation, and *shall not prevent such corporation from defending any action, suit or proceeding in any court of this State.*

Tex. Bus. Corp. Act Ann. art. 8.18B. (emphasis ours)

Of course, a more specific and controlling statute is Tex. Bus. Corp. Act Ann. art. 2.02 which enumerates those powers that a domesticated foreign corporation acquires from obtaining a license to do business:

> "A. Subject to the provisions of sections B and C of this Article, each corporation shall have power:
>
> . . . .
>
> (2) To sue and *be sued*, complain and *defend*, in its corporate name."

Tex. Bus. Corp. Act Ann. art. 2.02 (emphasis ours). See also V.T.C.A. Civil Practices and Remedies Code § 71.31. Moreover, the courts of Texas have specifically recognized article 8.02 as a "general" statute and even if it carried the meaning suggested by Respondents it would, under Texas law, give way to the more "specific" statutes mentioned above. The Texas courts have expressly recognized this principle. See *Amoco Production Co. v. Arendale*, 581 S.W.2d 755 (Tex. App. – Houston [14 Dist.] 1979).

In summary, article 8.02 simply does not, by either its language or plain meaning, limit Texas' *in personam* jurisdiction over a foreign corporation or distinguish this case from the *Knowlton* and *Bane* decisions. Article 8.02 is no more than a general statute granting admitted foreign corporations the same rights and privileges as domestic corporations and – *within appropriate constitutional limits* – imposing the same duties, restrictions, penalties and liabilities.

II.

Respondents also contend that *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U.S. 165 (1939) has lost its vitality due to this Court's "teachings in recent jurisdictional cases." Apparently this lesson has not been learned by all federal courts. For example, the district court in *In Re Des Cases*, 789 F.Supp. 552 (E.D.N.Y. 1992) recently stated:

> Although the Supreme Court has not directly pronounced on the subject since 1945, the constitutionality of the traditional practice of asserting general jurisdiction solely on the basis of a corporation's being licensed to do business in the forum seems to have survived *International Shoe*. *See Burnham v. Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (plurality opinion) (*International Shoe* did not supplant long-and widely-accepted methods of asserting jurisdiction); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174-75, 60 S.Ct. 153, 157-58, 84 L.Ed. 167 (1939) (upholding New York Corporation law requiring foreign corporation to designate agent for service of process as condition of doing business).

Id. at 591. See also *Manchester Knitted Fashions v. Amalgamated*, 967 F.2d 688 (1st Cir. 1992).

Neirbo remains viable because the reasoning and soundness of that decision is recognized and followed by our courts. For this additional reason, Petitioners request that this Court reaffirm the constitutional principles set forth in *Neirbo*.

CONCLUSION

In conclusion, the question before the Court still remains: Is the Due Process Clause violated by a state recognizing consent to "general" personal jurisdiction over a foreign corporation that obtains a license to do business and conducts business in that state? Petitioners suggest that the conflicting decisions of the various circuits and the far-reaching importance of this question demonstrate the need for resolution of this issue by the United States Supreme Court. The petition for a writ of certiorari should be granted and this question answered.

Respectfully submitted,

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